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No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

PALOMAR MOBILEHOME PARK ASSOCIATION, a Limited Partnership,

Petitioner,

vs.

THE CITY OF SAN MARCOS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FOURTH APPELLATE DISTRICT, DIVISION ONE, COURT OF APPEAL FOR THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

1. Two federal courts of appeal have held that the transfer of a premium value to a departing mobilehome tenant, representing the value of the right to occupy at a reduced rate under local mobilehome rent control ordinances, constitute an impermissible taking. Was it error for the state appellate court to disregard the rulings and hold that there was no taking under the fifth and fourteenth amendments?

2. Is there a violation of substantive due process under local rent controls for mobilehome parks, which do not provide for vacancy decontrol, where the effect of the ordinance is to merely transfer the value of the right to occupy at a reduced rate from the parkowner to the departing tenant, and in no way protects the present tenants in their

tenancy from rent increases or decreases, and increases the cost to incoming tenants by the amount of the "premium" paid by said tenant to the departing tenant for the right to occupy at a reduced rate?

3. Since the federal right or claim does not ripen until the state has denied just compensation, did the federal claim even exist at the time the state courts purported to dispose of it?

4. Does a federal "as applied" taking claim arise at the time of the passage of the rent control ordinance or sale of the coach for a premium, such that new federal claims, arising after completion of state court proceedings, are now ripe for decision by the federal district court?

LIST OF PARTIES

The caption of the case contains the names of all parties to the proceedings in the state court.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

PALOMAR MOBILEHOME PARK ASSOCIATION,
a Limited Partnership, Petitioner

vs.

THE CITY OF SAN MARCOS, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE FOURTH APPELLATE DISTRICT, DIVISION ONE, COURT OF APPEAL FOR THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

Petitioner, PALOMAR MOBILEHOME PARK ASSOCIATION, prays that a writ of certiorari issue to review the decision and judgment of the Fourth Appellate District, Division One, Court of Appeals for the State of California, filed on February 6, 1991 in the case of Palomar Mobilehome Park Association v. City of San Marcos, 4th Civ. App. D011484. That

judgment and decision finally affirmed the order of the Superior Court of San Diego County, California, dismissing plaintiff's complaint on demurrer of the City of San Marcos for failure to state a cause of action. A timely petition for the discretionary review of the Supreme Court of the State of California was denied on April 17, 1991.

OPINIONS BELOW

The Fourth Appellate District Court of Appeal for the State of California, Division One, has issued an opinion in this case, a copy of which appears in **Appendix A** to this Petition. The opinion is not to be published in Official Reports. A copy of the Order of the California Supreme Court denying the Petition for Review in this case appears in **Appendix B** to this Petition.

The California Supreme Court denied a Petition for Review in the case of Yee v. City of Escondido, 224 Cal.App.3d 1349, 274 Cal.Rptr. 551 (1990), an appellate opinion of the State Court of Appeals of California for the Fourth Appellate District, which is published, and has the same effect and holding as the unpublished opinion in Palomar.

The Superior Court of the State of California in and for the County of San Diego entered judgment dismissing plaintiff's complaint on demurrer on December 7, 1989 and a copy of the court's order appears in **Appendix C** to this petition.

JURISDICTION

The decision and judgment of the Fourth Appellate District, Division One, Court of Appeal for the State of California, was filed on February 6, 1991.

The Order of the California Supreme Court denying Appellant's Petition for Review was filed on April 17, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the U.S. Constitution provides in pertinent part:

> No person shall . . . be deprived of. . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

The California Constitution, Article I, Sec. 19, provides:

> Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The

Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.

The San Marcos Municipal Code, Chapter 16.16 of Title 16, provides space rental rate controls for mobilehome parks located within its jurisdiction. Section 16.16.080 provides in pertinent part:

> All space rents in a park shall be adjusted at the same time. A mobilehome park owner shall not increase or adjust space rents more than one time in any twelve consecutive month period.

The California Mobilehome Residency Law (Cal. Civ. Code §§ 798 et seq.), specifically §§ 798.55, 798.56 & 798.74,

protect tenants from eviction from a mobilehome park and require the approval of a purchaser of a mobilehome that will remain in the park if the purchaser has the financial ability to pay the rent and does not have a prior tenancy history indicating he or she will not comply with the rules and regulations of the park. (Pertinent portions of Cal. Civ. Code §§ 798 et seq. are set forth in **Appendix D** to this Petition.)

STATEMENT OF CASE

This Petition seeks review of the California Fourth Appellate Court's opinion and judgment denying an unconstitutional and irrational taking of property results from vacancy control in mobilehome park rent control ordinances, in direct contravention of the established federal law in both the Ninth and Third Circuits under Hall v. City of Santa

Barbara, 833 F.2d 1270 (9th Cir. 1987) cert. denied 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988) and Pinewood Estates of Michigan v. Barnegat Township, 898 F.2d 347 (3rd Cir. 1990).

PROCEDURAL BACKGROUND AND HOW THE FEDERAL QUESTIONS AROSE

The Complaint

Plaintiff filed suit in the San Diego Superior Court on September 14, 1989, challenging the City of San Marcos' mobilehome rent control ordinance as applied to plaintiff on the basis that the inability of the plaintiff parkowner to raise rents on a space at the time a mobilehome is sold in-place effects a taking of property which is specifically condemned in Hall v. City of Santa Barbara, supra, by allowing the outgoing tenant to sell along with his or her trailer the right to occupy the rent-

controlled space, for which a quantifiable premium is received by the outgoing tenant representing the value of the right to occupy and for which the landlord parkowner receives nothing. (Comp. ¶¶ 11-14, 16-20, 21-29).

Plaintiff further complained that the ordinance "is irrational and serves no legitimate governmental purpose in that it enables the tenant in-place to sell the mobilehome for a "premium" due to the existence of rent control, and thus dramatically increases the mobilehome price resulting in forever burdening the space with the need to pay the additional premium, or to finance the additional premium, and, thus, the statute is both irrational and does not serve a legitimate governmental purpose of preserving low or affordable housing." (Comp. ¶ 15).

The Demurrer

The City demurred, arguing that Hall v. City of Santa Barbara, supra, was not binding on the state courts and that the proper standard for analyzing whether a taking had occurred or whether the ordinance was a rational exercise of the City's police powers was that used for facial attacks to rent control per se, i.e. if the parkowner was making a fair return on the park as a whole, the parkowner had no right to complain of the taking of a discrete property interest. (City's Memorandum of Points & Authorities in Support of Demurrer, filed Oct. 12, 1989, pp. 6-14).

Plaintiff opposed the demurrer, arguing that as in Hall v. City of Santa Barbara, supra, this was an as applied attack and Hall constituted the entire published case law on point to this

litigation and was, thus, controlling, and that the City's ordinance effected a taking in the same way as did the ordinance found unconstitutional in Hall. Plaintiff argued that by allowing the departing tenant to sell the right to occupy the rent-controlled space, a taking occurred under both the California Constitution and the fifth and fourteenth amendments to the U.S. Constitution. Plaintiff further argued that the ordinance was arbitrary and not rationally related to a legitimate state interest, citing Schweiker v. Wilson, 450 U.S. 221, Nebbia v. New York, 291 U.S. 502, and Seawall Associates v. City of New York, 142 A.2d 72, and referring to the determination of the Central District Court, on remand in Hall, that the Santa Barbara ordinance was irrational in that "the limitation upon rent raises at the

time of sale did nothing to (1) protect present tenants from arbitrary or excessive rent increases; and (2) insure the existence of moderate or low income housing opportunities." (Plaintiff's Points & Authorities in Opposition to Demurrer, filed Oct. 19, 1989, pp. 1-15).

The Ruling on Demurrer

The Superior Court ruled for defendants and entered judgment on December 7, 1989, without leave to amend, finding "that Hall v. Santa Barbara, 833 F.2d 1270 (9th Cir. 1986), is neither binding nor persuasive to establish a 'per se' taking, and Plaintiff is not and cannot allege deprivation of all use of property for a regulatory taking" and the Court on its own motion dismissed the "action as to all parties in its entirety with prejudice". (Superior Court Order dated Dec. 07, 1989, **Appendix C**).

The Appeal

Plaintiff timely appealed the dismissal to the Fourth Appellate District Court of Appeals for the State of California, Division One. In Appellant's Opening Brief, plaintiff PALOMAR MOBILEHOME PARK ASSOCIATION argued that the effect of the City of San Marcos' mobilehome park rent control ordinance with vacancy control was an unconstitutional taking under both the California Constitution and the fifth and fourteenth amendments to the U.S. Constitution and that this taking due to vacancy control was recognized and condemned as a physical occupation taking of property requiring compensation both in Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1987) cert. denied 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988) and in the more recent case of Pinewood

Estates of Michigan v. Barnegat Township, 898 F.2d 347 (3rd Cir. 1990). Plaintiff argued that the federal cases constituted the controlling law as it was the only law on point to this litigation and the Central District had followed Hall, supra, in Azul Pacifico v. City of Los Angeles, (C.D.Cal. Case No. CV 87-2287-LEW) in rendering judgment for plaintiff and invalidating the Los Angeles mobilehome park rent ordinance because it did not provide for vacancy decontrol and thus effected an unconstitutional taking of property without compensation (that decision is now published as Azul Pacifico, Inc. v. City of Los Angeles, 740 F.Supp. (C.D.Cal. 1990)).

Appellant further argued that the ordinance violates the due process clause of the fourteenth amendment because it does not substantially advance legitimate

state interests, while effecting a physical taking of property, citing to Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141 (1987), in addition to those cases cited to the Superior Court, supra. (Appellant's Opening Brief, filed June 19, 1990).

The City argued that neither Hall v. City of Santa Barbara, supra, nor Pinewood Estates v. Barnegat Township, supra, were viable cases nor were they binding on the state courts, and that Azul Pacifico, supra, was merely a decision in which the Court was bound to follow Hall, supra.

Specifically, the City argued that the Hall case is against the weight of authority, rendered by a Ninth Circuit panel that was "confused" and "lost in their own rhetoric". (Respondent's Brief, filed on or about July 19, 1990, pp. 9-12). The City further argued that

subsequent cases decided by the U.S. Supreme Court undermined the Hall, supra, rationale. (Respondent's Brief, pp. 13-19).

As to the Pinewood, supra, case, the City argued that the Third Circuit's decision was flawed because it had not considered those cases which the City alleged undermined the Hall, supra, case, specifically F.C.C. v. Florida Power Corp., 480 U.S. 245, 107 S.Ct. 1107 (1987); Pennell v. City of San Jose, 485 U.S. 1, 108 S.Ct. 849 (1988); Eamiello v. Liberty Mobile Home Sales, 208 Conn. 620, 546 A.2d 805 (1988) app. dism., __ U.S. __, 109 S.Ct. 1104 (1989); Thompson v. Merlino Enterprises, 208 Conn. 656, 545 A.2d 1094 (1988) app. dism. __ U.S. __, 109 S.Ct. 829 (1989) and United States v. Sperry, __ U.S. __, 110 S.Ct. 387 (1989) as well as Oceanside Mobilehome Park

Owners Assn. v. City of Oceanside, 157 Cal.App.3d 887, 204 Cal.Rptr. 239 (1984).

Appellant argued in Reply that, contrary to Respondent's assertions, there was no case law contrary to Hall, supra, Pinewood, supra, and Azul Pacifico, supra, as no other case addressed the issues in this litigation. Appellant explained the cases cited by the City were all distinguished from the present litigation in material ways which compelled the following of the federal cases which had specifically found vacancy control provisions of mobilehome park rent control ordinances effected a taking requiring compensation. (Appellant's Reply Brief, pp. 2-15).

Appellant further argued the standard to be applied in determining whether the ordinance satisfies substantive due process under the fourteenth amendment to

the U.S. Constitution is a higher standard of scrutiny due to the resultant physical taking of property under the ordinance. (Appellant's Reply Brief, pp. 15-16).

The Ruling on Appeal

The Fourth Appellate court issued its ruling on February 6, 1991, affirming the trial court's dismissal.

The Taking Claim

In summarizing the case, the Court said,

> Palomar's complaint alleged the "vacancy control" aspect (i.e. the restriction on the landlord's ability to raise rents at the time of vacancy) of the City of San Marcos's (City) mobilehome rent control ordinance was an unconstitutional taking by the government without compensation and an irrational exercise of governmental power which served no legitimate

purpose. We hold this facial attack as meritless, since there is no contention the vacancy control cannot be applied in a manner to ensure the park owner a fair return on his investment, and since the vacancy control serves the legitimate purpose of protecting new tenants from excessive rents. Palomar's allegation that the economic effect of the ordinance is to transfer the property's wealth from the landlord to the tenant--by allowing a departing tenant to sell his mobilehome at a price above "market value" while depriving the landlord of his right to extract that wealth from his property in the form of increased rents from the purchasing tenant--does not state a cognizable taking claim. Absent a showing the vacancy control aspect of

the ordinance makes it impossible for the landlord to obtain a fair and reasonable return on his investment, there is no facial invalidity to the City's exercise of regulatory power for the well-recognized purpose of preventing excessive rents which arise in an imperfect free market.

(4th App. Opn., pp 1-2, **Appendix A**).

In discussion, the Court asserted:

> For purposes of reviewing this appeal after the sustaining of a demurrer, we liberally construe and accept as true the allegations in the complaint. (King v. Central Bank (1977) 18 Cal.3d 840, 843.)

(4th App. Opn., **Appendix A**, pp. 5-6).

In characterizing plaintiff's complaint the court said:

> Palomar alleges an unconstitutional taking[1] has occurred since the rent control ordinance has the effect of allowing the tenant to sell his mobilehome for more than its market value based on the lower rent ensured to the purchasing tenant. Without the vacancy control, Palomar asserts, this "premium" extracted by the selling tenant would flow to the landlord, who could increase the rent to market levels at the time of the sale.

(4th App. Opn., **Appendix A**, p. 5).

Footnote 1 of the Court's Opinion reads:

> A governmental taking of private property without compensation is proscribed by the fifth amendment of

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the federal Constitution (see Pennell v. San Jose (1987) 485 U.S. 1, 4) and article I, section 19 of the California Constitution.

(4th App. Opn., **Appendix A**, p. 5).

Thus, in its determination that plaintiff had not stated a cognizable taking claim, the Fourth Appellate Court was adjudicating plaintiff's claims under the fifth (and fourteenth) amendments to the U.S. Constitution as well as under the California Constitution. However, in so ruling, the Court specifically declined to follow the federal cases of Hall, supra, and Pinewood, supra, saying in footnote 4:

> The decisions of lower federal courts may be persuasive, but they are not binding. (See Graham v. Scissor-Tail, Inc. (1981) 28 Cal.3d 807, 830.) The denial of a writ of certiorari in the Hall case carries no implication

regarding the United States Supreme court's views on the merits of the case. (See State of Maryland v. Baltimore Radio Show (1950) 70 S.Ct. 252, 255.)

(4th App. Opn., **Appendix A**, p. 11).

The Court noted elsewhere in its opinion in derogation of the federal cases of Hall and Pinewood Estates:

> Palomar's argument is divorced from the well-established principles used to evaluate when a compensable government taking has occurred in the context of rent control.. . .Absent a contention it is precluded from charging sufficient rent to obtain a reasonable return from its investment, Palomar's claim that the vacancy control allows the tenant to extract a "premium" from the sale of his

mobilehome is irrelevant to the taking issue presented here.. . .

Palomar's citation to Hall v. City of Santa Barbara [cite] and Pinewood Estates v. Barnegat Tp. Leveling Bd. [cite] does not persuade us otherwise.. . . Hall v. City of Santa Barbara, supra, 833 F.2d at page 1278, characterizes as irrelevant the argument that the landlord was adequately compensated by the rents he received, and in effect rejects the well-established test for a taking from rent control (i.e., whether the landlord can receive a fair return from his investment). Instead, relying on Loretto v. Teleprompter Manhattan CATV Corp., supra, 458 U.S. 419, Hall v. City of Santa Barbara, supra, 833 F.2d at pages 1275-1276, applies the analysis used for a

permanent physical occupation of property. Hall v. City of Santa Barbara, supra, 833 F.3d at page 1278, concludes that case precedent upholding the validity of rent control ordinances was distinguishable, since those cases did not involve claims that the "tenant's right to possess the property at reduced rental rates was transferable to others, that it had a market value, that it was in fact traded on the open market and that tenants were reaping a monetary windfall by selling this right to others." Pinewood Estates v. Barnegat Tp. Leveling Bd., supra, 898 F.2d at page 353, uses essentially the same analysis as Hall.

In our view, Hall's and Pinewood's reliance on Loretto is misplaced, and the cases erroneously

fail to apply the "fair return on investment" standard for rent control. (4th App. Opn., **Appendix A**, p. 11-14).

The Substantive Due Process Claim

In ruling on appellant's substantive due process claim, the Fourth Appellate Court used the standard applicable to facial attacks to price controls in general, rather than the standard proper for an as applied attack to a regulation that effects a physical occupation taking of property. In ruling against appellant, the Court said:

> Price control, including rent control, is unconstitutional under the due process clause of the Fourteenth Amendment of the federal Constitution if it is "arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt . . . ." (Pennell v. San Jose,

supra, 484 U.S. at p. 11.) Palomar's allegations do not dispute that the vacancy control protects the purchasing tenant from excessive rent, which is a legitimate state interest, and which interest is not defeated by the alleged fact of an increase in the cost of the coach.

(4th App. Opn., **Appendix A**, p. 21-22).

The Federal Claim Did Not Even Exist At the Time the State Court Purported To Dispose of it

(a) Elements of a Cause of Action For Fifth Amendment Taking Claim.

The court in Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108 (1985) set forth the elements of a taking claim under the fifth amendment as follows:

> The Fifth Amendment does not proscribe the taking of property; it

proscribes taking without just compensation.. . .If the government has provided an adequate process for taking compensation and if resort to that process "yield[s] just compensation," then the property owner "has no claim against the Government" for a taking.. . .Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.. . .Thus, the state's action is not "complete" in the sense of causing the constitutional injury "unless or until the state fails to provide an adequate post deprivation remedy for the property loss".

Williamson Planning Comm., supra, 473 U.S. at 194-195, (internal citations omitted).

There are, thus, at least two elements to a taking claim under the fifth amendment: (1) a taking, and (2) a failure of post deprivation remedies to provide just compensation.

The second element for a taking under federal law is that the State by its conduct establish that adequate compensation will not be provided. That element can only be satisfied by utilizing state procedures, completing them without success, and then, and only then, is there a federal right under the Fifth Amendment. It is at that time of completion that plaintiff's federal claims arise.

Sinaloa Lake Owners Association v. City of Simi Valley, 882 F.2d 1398 (9th Cir. 1989), cert. den. __ U.S. __, 110

S.Ct. 1317 (1990) speaks to exactly the same point:

> So long as the state provides "an adequate process for obtaining compensation," no constitutional violation can occur until the state denies just compensation.

Sinaloa, supra, 882 F.2d at 1402, (emphasis added).

Since the state courts of California have failed to provide just compensation, the federal claim ripens only after state court action is complete and thus, the purported ruling on the federal claim is an act without any effect since the federal claim did not exist until and after the state court proceedings on the matter had come to an end.

(b) This is a Continuing Wrong, Each New Sale of a Coach Creates a New Cause of Action, and the Federal Claim is Now Ripe for Adjudication.

It is indisputable that a cause of action arises on each sale of a coach. Since a cause of action under Hall does not exist until there has been the monetization of the right to occupy the space at a reduced rent by the departing tenant (i.e., the tenant receives a premium due to rent control), unless and until the premium has been received, no cause of action may be maintained.

Two examples illustrate the point:

(a) Suppose an ordinance is passed, and, thereafter, for a period of five years a coach is not sold. No cause of action exists under Hall, there has been no prohibited transfer of the premium value of the coach, and the cause of

action will arise, if at all, at the time of the sale of the coach.

(b) Suppose after a statute is passed, real property values decline for a period of five years, and the departing tenant receives no premium value for the coach upon sale. Again, under Hall, there would be no cause of action upon which a lawsuit can be maintained.

The application of defendant's ordinance to plaintiff's private property effects a taking without just compensation. It is a continuing wrong. The question of when a claim accrues is determined by federal law. McCune v. City of Grand Rapids, 842 F.2d 903, 905 (6th Cir. 1988); Compton v. Ide, 732 F.2d 1429 (9th Cir. 1984); Storey v. U.S., 629 F.Supp. 1174, 1177 (ND Miss. 1986).

The continuing wrong applies in federal court:

> Where a continuous chain of events or course of conduct is involved the cause of action accrues at the time of the final act in a series of event or course of conduct.

Barbaccia v. County of Santa Clara, 451 F.Supp. 260, 266 (ND Cal. 1978).

The continuing wrong doctrine also applies to civil rights violations and taking claims which are made in federal court. Front Royal and Warren Industrial Parks v. Front Royal, 708 F.Supp. 1477 (WD Va. 1989). The Front Royal court rules that a city's refusal to connect sewers to a property was a continuing wrong and that the statute of limitations did not begin running on the date that sewers were scheduled to be installed.

> This court has previously considered the statute of limitations defense offered by defendants and has found

> that, since there was a continuing wrong, plaintiff's action [for inverse condemnation and civil rights violation] are not time barred.

(708 F.Supp. at 1487).

Similarly in Lockary v. Kayfetz, 587 F.Supp. 631, 635 (N.D. Cal. 1984), the district court applied the continuing wrong doctrine to a taking claim on the grounds that the implementation and enforcement of a water moratorium was a continuing wrong.[2]

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[2] The California Supreme Court applied a continuing wrong doctrine to an action brought by neighboring homeowners for inverse condemnation and nuisance against a public entity operating an airport in Baker v. Burbank-Glendale-Pasadena Airport Authority, 39 Cal.3d 862, 705 P.2d 866 (1985). The Baker court discussed the difference between permanent and continuing nuisances:

> On the one hand, permanent nuisances are of a type where 'by one act a permanent injury is done, [and] damages are assessed once for all.' . . . Damages are not dependent upon any subsequent use of the property but are complete when the nuisance comes

The source of an entire claim needs to be analyzed to determine if a wrong is continuing:

> We are not now called upon to decide whether in a situation like this (recovery of inverse condemnation damages after the government flooded land) a landowner might be allowed to bring suit as soon as inundation threatens. Assuming that such an

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into existence.

On the other hand, if a nuisance is a use which may be discontinued at any time, it is considered continuing in character and persons harmed by it may bring successive actions for damages until the nuisance is abated. 39 Cal.3d 862 at 868-869.

The Baker court went on to discuss the importance of plaintiff's election to treat the nuisance as permanent or continuing:

> In case of doubt as to the permanency of the injury the plaintiff may elect whether to treat a particular nuisance as permanent or continuing. The importance of the plaintiff's election has long been recognized. 39 Cal.3d at 870.

> action would be sustained, it is not a good enough reason why he must sue then or have, from that moment, the statute of limitations run against him. If suit must be brought, lest he jeopardize his rights, as soon as his land is invaded, other contingencies would be running against him - for instance, the uncertainty of the damage and the risk of res judicata against recovering later for damage as yet uncertain. The source of the entire claim . . . is not a single event; it is continuous and as there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized.

United States v. Dickinson, 331 U.S. 745, 749 (1946).

A variation on the continuing wrong doctrine is found in Gordon v. City of Warren, 579 F.2d 386 (7th Cir. 1978). In Gordon the court ruled that the statute of limitations for damages under 42 U.S.C. § 1983 did not even begin to run until the ordinance at issue was declared invalid. The district court had applied a three-year statute of limitations running from the date of enactment and rejected application of the continuing wrong doctrine. The Court of Appeal reversed setting the date of the accrual of the right to seek damages as the date on which the court ruled the ordinance invalid.

Here, the request to declare the ordinance invalid is made in the same action as the damage claim. Application of a rule of accrual which would run from the date of declaration of invalidity is a variant on the continuing wrong doctrine.

The plaintiff meets either characterization of the rule. The right of action claimed by the plaintiff to recover damages accrued within the time permitted in the statute of limitations.

Another manner in which to determine if a wrong is a continuing wrong is to look at how a remedy can be fashioned. If the plaintiff could sue for all damages and recover them in one action, the wrong would not be continuing. (See Korgel v. U.S., 619 F.2d 16 (8th Cir. 1980)).

It has been held that the enactment of an ordinance alone does not give rise to a cause of action. It is the resulting damage under the ordinance that gives rise to a claim. (Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264, 293-297 (1981); Pennell v. City of San Jose, 485 U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d (1988)).

Recovery is only available to plaintiff as to coaches which have sold. Mobilehome coaches which have not sold have not resulted in a transfer of the unconstitutionally taken rights as the party owning the coach has only benefitted from the constitutional portions of the City's rent control scheme.

It is only when the mobilehome coach owner sells that the authority of the unconstitutional portions of the rent control scheme are invoked. It is only when the mobilehome coach sells that damage arises. It is an essential corollary that a separate damage arises each time a coach is sold. Since the plaintiff cannot recover in one action for the damages from coaches that have not yet sold, plaintiff would require successive actions for damages. The need for

successive actions is a hallmark of a continuing wrong.

> Where the damages resulting from an act are continuing or recurring so that they cannot at present be ascertained or estimated to bring in a single action, then separate and successive actions may be brought to recover damages as they occur. In those cases, the action accrues for purposes of the limitation period from the date of each injury and the plaintiff is not barred for a recovery for such damages as have accrued within this statutory period before the filing of the action.

Piccolini v. Simon's Wrecking, 686 F.Supp. 1063, 1076-1077 (MD Pa. 1988).

The Petition for Review to the California Supreme Court

A Petition for (the discretionary) Review to the California Supreme Court was timely filed by plaintiff/ appellant/ petitioner PALOMAR MOBILEHOME PARK ASSOCIATION. In its Petition, PALOMAR argued that the California Supreme Court should take the case for review as the decision rendered in the Fourth Appellate District, Division One, was directly in contravention to federal case law established by the Hall, Pinewood Estates, and Azul Pacifico cases (cited supra). However, the California Supreme Court entered an order denying the Petition on April 17, 1991.

WHY THIS WRIT SHOULD BE GRANTED

Special and important reasons exist for the granting of this Petition for Review as identified in Supreme Court Rule

10. The important questions of federal law presented here have never been ruled upon by this Court.

As specifically enunciated in Supreme Court Rule 10 (b), review may be granted:

> When a state court of last resort has decided a federal question in a way that conflicts with the decision of a U.S. court of appeals.

In Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1987) cert. denied 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988), the Ninth Circuit Court found the Santa Barbara mobilehome rent control ordinance, identical in legal effect to the ordinance in San Marcos, effected an unconstitutional taking without compensation.

In Pinewood Estates of Michigan v. Barnegat Township, 898 F.2d 347 (3rd Cir. 1990), the Third Circuit found that

vacancy control provisions of the Barnegat mobilehome park rent control ordinance in conjunction with state law (similar to the California Mobilehome Residency laws) effected a physical occupation taking without compensation in violation of the fifth and fourteenth amendments to the U.S. Constitution.

The state courts here specifically denied the viability of the Hall, supra, and Pinewood, supra, cases, and, concluding that they were not bound to follow them, determined that plaintiffs could not state a cause of action under either the California Constitution or the federal Constitution.

Petitioner contends the California state courts erred in determining federal rights under the fifth and fourteenth amendments in contravention of the entire published federal case law on point. In

essence, by refusing to accept the precedents established in Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1987) cert. denied 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988), Pinewood Estates of Michigan v. Barnegat Township, 898 F.2d 347 (3rd Cir. 1990), and further explained in Azul Pacifico, Inc. v. City of Los Angeles, 740 F.Supp. (C.D.Cal. 1990), while determining that plaintiff petitioner had failed to state a cognizable taking claim, the California Fourth Appellate court, Division One, has effectively overruled the decisions of two unanimous federal appeals courts.

Such flagrant disregard for federal law cannot be tolerated. This Supreme Court should grant this Petition for Review to protect this and similar plaintiffs from having their constitutional rights extinguished by

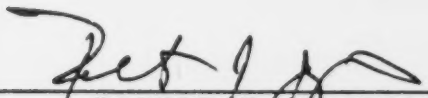
state courts who fail to follow federal court precedence on issues of federal law.

IN CONCLUSION

Petitioner PALOMAR MOBILEHOME PARK ASSOCIATION requests this court to grant its petition for review or in the alternative to remand to the lower court with instructions to limit its decision to state constitutional issues and in accord with ruling federal constitutional law.

Respectfully submitted,

LAW OFFICES OF JAGIELLO & PECH

By 
ROBERT J. JAGIELLO
Attorneys for Petitioner
PALOMAR MOBILEHOME PARK ASSOCIATION

APPENDIX A

APPENDIX A

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

PALOMAR MOBILEHOME PARK ASSOCIATION,	)	
Plaintiff and Appellant,	)	D011484
v.	)	(Super. Ct. No. N45074)
CITY OF SAN MARCOS,	)	
Defendants and Respondents.	)	

Filed February 6, 1991.

APPEAL from a judgment of the Superior Court of San Diego County, Robert J. O'Neill, Judge. Affirmed.

Palomar Mobilehome Park Association (Palomar) appeals a judgment of dismissal after the sustaining of a demurrer. Palomar's complaint alleged the "vacancy control" aspect (i.e. the restriction on

the landlord's ability to raise rents at the time of vacancy) of the City of San Marcos's (City) mobilehome rent control ordinance was an unconstitutional taking by the government without compensation and an irrational exercise of governmental power which served no legitimate purpose. We hold this facial attack as meritless, since there is no contention the vacancy control cannot be applied in a manner to ensure the park owner a fair return on his investment, and since the vacancy control serves the legitimate purpose of protecting new tenants from excessive rents. Palomar's allegation that the economic effect of the ordinance is to transfer the property's wealth from the landlord to the tenant -- by allowing a departing tenant to sell his mobilehome at a price above "market value" while depriving the landlord of his right to

extract that wealth from his property in the form of increased rents from the purchasing tenant -- does not state a cognizable taking claim. Absent a showing the vacancy control aspect of the ordinance makes it impossible for the landlord to obtain a fair and reasonable return on his investment, there is no facial invalidity to the City's exercise of regulatory power for the well-recognized purpose of preventing excessive rents which arise in an imperfect free market.

I

The City's mobilehome rent control ordinance establishes a Mobile Home Rent Review commission which reviews proposed rent increases for mobilehome spaces. (San Marcos Mun. Code, § 16.16.) The ordinance includes findings that a shortage of mobilehome rental spaces and

the cost of moving a mobilehome has created an imbalance in the bargaining position of park owners and mobilehome owners in favor of park owners, and declares it necessary to protect the mobilehome owner from unreasonable space rental increases while at the same time recognizing the need of park owners to receive a just and reasonable return on their investments. (San Marcos Mun. Code, § 16.16.010.) The ordinance requires all space rents be adjusted at the same time and no more than one time in any 12 month period, with written notice of the increase to the City and the mobilehome owners. (San Marcos Mun. Code, §§ 16.16.080, subd. (a) & 16.16.055.) If a complying homeowner rent review petition is filed, the increase is stayed until the Mobile Home Rent Review commission makes its decision. (San Marcos Mun. Code, §

16.16.060.) At a public hearing, the park owner has the burden of proving the increase is reasonable and necessary to enable him to receive a just and reasonable return on his investment. (San Marcos Mun. Code, § 16.16.070, subd. (g).)

Palomar alleges an unconstitutional taking[1] has occurred since the rent control ordinance has the effect of allowing the tenant to sell his mobilehome for more than its market value based on the lower rent ensured to the purchasing tenant. Without the vacancy control, Palomar asserts, this "premium" extracted by the selling tenant would flow to the landlord, who could increase the rent to

[1] A governmental taking of private property without compensation is proscribed by the Fifth Amendment of the federal Constitution (see Pennell v. San Jose (1987) 485 U.S. 1, 4) and article I, section 19 of the California Constitution.

market levels at the time of the sale. For purposes of reviewing this appeal after the sustaining of a demurrer, we liberally construe and accept as true the allegations in the complaint. (King v. Central Bank (1977) 18 Cal.3d 840, 843.)

We note preliminarily that at some points in its argument, Palomar refers to the combined effect of the rent control ordinance and the California Mobilehome Residency Law -- the former which restricts the park owner's ability to raise rents, and the latter which precludes termination of a tenancy except for specified reasons constituting good cause and requires a park owner to accept the new tenant purchasing a coach from a departing tenant except under certain specified circumstances (Civ. Code, §§

798.56, 798.74).[2] However, Palomar states it is not challenging the constitutionality of the state law, asserting that even absent the state law, the local rent control ordinance would achieve a taking. Palomar explains no taking would occur if it could raise the rent to market rates for the new purchasing tenant. Thus, the crux of its complaint is the rent controls not the requirement it accept the new tenant. More specifically, Palomar complains about the vacancy control aspect of the

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[2] The state statute states findings that "because of the high cost of moving mobilehomes, the potential for damage resulting therefrom, the requirements relating to the installation of mobilehomes, and the cost of landscaping or lot preparation, it is necessary that the owners of mobilehomes occupied within mobilehome parks be provided with the unique protection from actual or constructive eviction afforded by the provisions of this chapter." (Civ. Code, § 798.55, subd. (a).)

ordinance -- i.e., the fact the ordinance does not lift the rent increase restrictions when a new tenant moves in.

Essentially, the same arguments raised in this appeal have recently been rejected by this court in Yee v. City of Escondido (1990) 224 Cal.App.3d 1349, and by another court in Peppard v. City of Carpinteria (filed Jan. 3, 1991, B047242) 91 Daily J. D.A.R. 245.

Palomar's argument is divorced from the well-established principles used to evaluate when a compensable government taking has occurred in the context of rent control. Rent control ordinances "are within the police power if they are reasonably calculated to eliminate excessive rents and at the same time provide landlords with a just and reasonable return on their property. However, if it is apparent from the face

of the provisions that their effect will necessarily be to lower rents more than could reasonably be considered to be required for the measure's stated purpose, they are unconstitutionally confiscatory." (Birkenfeld v. City of Berkeley (1976) 17 Cal.3d 129, 165; see generally, Carson Mobilehome Park Owners' Assn. v. City of Carson (1983) 35 Cal.3d 184, 191; Pennell v. San Jose, supra, 485 U.S. at p. 12, fn. 6; FCC v. Florida Power Corp. (1987) 480 U.S. 245, 252; Loretto v. Teleprompter Manhattan CATV Corp. (1982) 458 U.S. 419, 440.) A rent control ordinance will be struck down as facially confiscatory only if its terms are so restrictive so as to facially preclude any possibility of a just and fair return. (Oceanside Mobilehome Park Owners' Assn. v. City of Oceanside (1984) 157 Cal.App.3d 887, 897, 906-907.)

As in Yee, Palomar does not argue that the vacancy control aspect of the ordinance is not reasonably calculated to eliminate excessive rents, or that it will necessarily result in confiscatorily low rents (see Carson Mobilehome Park Owners' Assn. v. City of Carson, supra, 35 Cal.3d at p. 189, fn. 4; San Marcos Mobilehome Park Owners' Assn. v. City of San Marcos (1987) 192 Cal.App.3d 1492, 1502-1503); nor does it argue the ordinance as applied has forced confiscatorily low rents on the landlord. Accordingly, it has not presented a cognizable taking claim. Absent a contention it is precluded from charging sufficient rent to obtain a reasonable return from its investment, Palomar's claim that the vacancy control allows the tenant to extract a "premium" from the sale of his mobilehome is irrelevant to the taking issue presented

here.[3] (See Oceanside Mobilehome Park Owners' Assn. v. City of Oceanside, supra, 157 Cal.App.3d at pp. 906-907.)

Palomar's citation to Hall v. City of Santa Barbara (9th Cir. 1986) 833 F.2d 1270, cert. den. 485 U.S. 940 and Pinewood Estates v. Barnegat Tp. LevelingBd. (3rd

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[3] Under rent control theory, imperfect free market conditions (i.e. scarcity of and high demand for rental property) can result in artificially inflated rents, which justifies rent controls to protect tenants from burdensome rent increases. (See Pennell v. San Jose, supra, 485 U.S. at pp. 11-13.) Palomar may debate with the legislative branch the economic wisdom of rent control and vacancy control provisions. However, Palomar's argument -- premised on a claim that economic wealth from property has been transferred from landlord to tenant -- lacks a valid legal underpinning when tested against the well-established test for a taking from rent control. Palomar may argue to the courts that the ordinance has been unconstitutionally applied by denying it a fair rent increase. HOwever, absent a showing the rent controls can never give it a fair return, Palomar's facial attack on the ordinance as constituting a taking is meritless.

Cir. 1990) 898 F.2d 347 does not persuade us otherwise.[4] Hall v. City of Santa Barbara, supra, 833 F.2d at page 1276, reverses a dismissal of a complaint, holding there was a factual question whether a mobilehome rent control ordinance transferred a possessory interest in land from the landlord to the tenant, which interest consisted of the tenant's right to occupy the property in perpetuity while paying a reduced rent, and which interest the tenant could sell in the open market by capturing a rent control premium when he sells his mobile home. Hall v. City of Santa Barbara,

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[4] The decisions of lower federal courts may be persuasive, but they are not binding. (See Graham v. Scissor-Tail, Inc. (1981) 28 Cal.3d 807, 830.) The denial of a writ of certiorari in the Hall case carries no implication regarding the United States Supreme court's views on the merits of the case. (See State of Maryland v. Baltimore Radio Show (1950) 70 S.Ct. 252, 255.)

supra, 833 F.2d at page 1278, characterizes as irrelevant the argument that the landlord was adequately compensated by the rents he received, and in effect rejects the well-established test for a taking from rent control (i.e., whether the landlord can receive a fair return from his investment). Instead, relying on Loretto v. Teleprompter Manhattan CATV Corp., supra, 458 U.S. 419, Hall v. City of Santa Barbara, supra, 833 F.2d at pages 1275-1276, applies the analysis used for a permanent physical occupation of property. Hall v. City of Santa Barbara, supra, 833 F.3d at page 1278, concludes that case precedent upholding the validity of rent control ordinances was distinguishable, since those cases did not involve claims that the "tenant's right to possess the property at reduced rental rates was

transferable to others, that it had a market value, that it was in fact traded on the open market and that tenants were reaping a monetary windfall by selling this right to others." Pinewood Estates v. Barnegat Tp. Leveling Bd., supra, 898 F.2d at page 353, uses essentially the same analysis as Hall.

In our view, Hall's and Pinewood's reliance on Loretto is misplaced, and the cases erroneously fail to apply the "fair return on investment" standard for rent control. Loretto v. Teleprompter Manhattan CATV Corp., supra, 458 U.S. 419 at pages 434-435, 440-441, narrowly holds that where governmental action is a permanent physical occupation of property (i.e., a law requiring landlords to permit cable television attachments to their buildings), a per se taking has occurred regardless of whether the action achieves

an important public benefit or has only minimal economic impact on the owner. Loretto v. Teleprompter Manhattan CATV Corp., supra, 458 U.S. at page 426, commences its analysis by noting that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises form some public program adjusting the benefits and burdens of economic life to promote the common good." Loretto expressly states its holding is not meant to interfere with the government's power to adjust landlord/tenant relationships, pointing to the court's consistent affirmance of the states' power to regulate the landlord/tenant relationship without paying compensation for all economic injuries that such regulation entails (id. at p. 440, citing Supreme

court cases upholding rent control laws), and noting that in "none of these cases . . . did the government authorize the permanent occupation of the landlord's property by a third party" (ibid.).

As we noted earlier, Palomar is not challenging the state law requirement that it accept the new purchasing tenant chosen by the selling tenant -- thus this component of the regulatory scheme does not bring this case into the "permanent physical occupation" parameters of Loretto.[5] As explained by Palomar, even

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[5] We note that in Eamiello v. Liberty Mobile Home Sales (Conn. 1988) 546 A.2d 805, 816-817, the court held a state law's requirement that a mobilehome park owner allow a tenant to extend the term of his lease indefinitely and to transfer that right to a purchaser of his mobilehome, did not constitute permanent physical occupation under Loretto. Accordingly, since no per se taking had occurred, Eamiello v. Liberty Mobile Homes Sales, supra, 546 A.2d at pages 819-820, evaluates whether a taking had occurred based on whether the ordinance served a substantial public purpose without undue

if the landlord had exclusive power to chose the new tenant, under the local ordinance it still would be subject to the rent increase restrictions. Thus, it is not the physical occupation of the new tenant which is being challenged, but rather the challenge is to the limits on the rent increases and corresponding effect on the price of the selling tenant's coach. And, contrary to the analysis used in Hall, this is not a case which challenges the transfer of a

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harm to the economic interests of mobilehome park owners, and concludes there was no taking. Eamiello notes that unlike the ordinance in Hall, the ordinance before it did not provide for rent control, but merely restricted rent increases to levels consistent with rents for comparable lots in the park. (Eamiello v. Liberty Mobile Home Sales, supra, 546 A.2d at p. 820.) The ordinance we are presented with does of course provide for rent control, but, as we have stated, there is no contention the limits on the rent increases have caused an economic hardship to the park owner.

possessory interest from landlord to tenant, since even if the landlord retained the right to choose the purchasing tenant, Palomar would still be complaining about the restriction on rent increases at vacancy and the corresponding increase in the value of the mobilehome sold by the departing tenant.

The alleged effect of the vacancy control aspect of the ordinance, as allowing tenants to sell their mobilehomes at a higher price than tenants at noncontrolled parks, cannot reasonably be construed as a "permanent physical occupation" within the meaning of Loretto. A Supreme Court case subsequent to Hall has again emphasized there is no per se taking under Loretto when the government action does not force a property owner to acquiesce to a physical occupation of his property. (FCC v. Florida Power Corp.,

supra, 480 U.S. at pp. 252-253 [no per se taking arising from FCC review of rents charged by public utility landlords who rent utility pole space to cable company tenants].) Here, the complained-of effect of the vacancy control is upon the landlord's return from the free market -- which is an adjustment "of the benefits and burdens" of economic life, not a physical occupation. Accordingly, the vacancy control is not a per se taking, and it can only be challenged upon a claim it deprives the landlord of a fair return on his investment, a contention not presented here. The alleged fact the tenant may obtain a higher price for the sale of his mobilehome than a tenant in a noncontrolled park,[6] does not indicate the

[6] We note that assuming the truth of Palomar's alleged facts that rent controlled tenants obtain more for their mobilehomes than non-rent controlled tenants, Palomar's contention can easily

landlord is necessarily being deprived of a fair return from the face of the ordinance.[7]

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be turned on its head to characterize the vacancy control as not providing the tenants a "premium" from the sale of their home, but rather as protecting tenants from the landlord's ability to reap a monetary windfall by charging excessively high rents available in the imperfect free market and thereby artificially deflating the price of the tenant's mobilehome. (See fn. 3, ante.) In any event, since Palomar does not assert it cannot raise rents to a level to give it a fair return on its investment, its concern about the cost of mobilehomes in sales transactions between tenants is irrelevant to the constitutional challenge presented here.

[7] In Hall v. City of Santa Barbara, supra, 833 F.2d at pages 1282-1283, three judges dissented from the majority's denial of a petition for a rehearing en banc, pointing out that the United States Supreme court in recent years has dismissed, as lacking a substantial federal question, challenges to comparable rent control ordinances, and concluding that the "reason that the Supreme court has had little difficulty with rent control cases is that economic regulation of landowners' profit does not constitute a taking so long as the owner is allowed a reasonable return on investment."

In Azul Pacifico, Inc. v. City of Los Angeles (C.D.Cal. 1990) 740 F.Supp. 772, 774, 779, the lower district court was

II

Palomar asserts the vacancy control aspect of the ordinance violates substantive due process since it does not advance legitimate state interests because (1) the limitation on increases in rent at the time of sale does nothing to protect the present tenant, and (2) by causing dramatic increases in the prices of coaches, it does nothing to preserve low and moderate income housing opportunities. Price control, including rent control, is unconstitutional under the due process

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bound to follow Hall's analysis, and the court held the vacancy control provision of a mobilehome rent control ordinance constituted a taking based on the amount the selling tenant obtained for his mobilehome above the price of a comparable home in a noncontrolled park. We note Azul-Pacifico contains strong dicta suggesting it disagrees with Hall's physical taking analysis, and only reached its result because it was bound to do so under Hall. (Azul-Pacifico, Inc. v. City of Los Angeles, supra, 740 F.Supp. at pp. 774, 778, 780-781.)

clause of the Fourteenth Amendment of the federal Constitution if it is "arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt . . . ." (Pennell v. San Jose, supra, 484 U.S. at p. 11.) Palomar's allegations do not dispute that the vacancy control protects the purchasing tenant from excessive rent, which is a legitimate state interest, and which interest is not defeated by the alleged fact of an increase in the cost of the coach. Since there is no contention the vacancy control does not reasonably relate to the legitimate interest of preventing excessive rents, any challenge to the wisdom of the measure based on the cost of the coaches is a policy question for the Legislature, not the courts. (Birkenfeld v. City of Berkeley, supra, 17 Cal.3d at p. 159.)

The complaint fails to state facts entitling Palomar to relief, and the demurrer was properly sustained.

DISPOSITION

The judgment is affirmed.

/S/ Work
Work, Acting
P.J.

WE CONCUR:

/S/ Todd, J.
Todd, J.

/S/ Benke, J.
Benke, J.

APPENDIX B

APPENDIX B

Fourth Appellate District, Division One
No. D011484, SO19940

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PALOMAR MOBILEHOME PARK ASSOCIATION, Appellant

v.

CITY OF SAN MARCOS Et Al., Respondents

Filed April 17, 1991

Appellant's petition for review DENIED. The request for an order directing publication of the opinion is denied.

Panelli, J. is of the opinion the petition should be granted.

Baxter, J. did not participate.

/S/ LUCAS
Chief Justice

APPENDIX C

APPENDIX C

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

PALOMAR MOBILEHOME PARK ASSOCIATION, a Limited Partnership, Plaintiff, v. THE CITY OF SAN MARCOS, a Municipal Corporation, and DOES 1 through 10, inclusive, Defendants.	CASE NO. N54074 ORDER GRANTING CITY OF SAN MARCOS' DEMURRER AND DISMISSING ENTIRE ACTION AS TO ALL PARTIES DATE: 11-6-89 TIME: 2:00 p.m. DEPT: D

Filed December 7, 1989.

On November 6, 1989, the Honorable Robert O'Neill, Judge of the San Diego Superior Court, issued a telephonic ruling on Defendant City of San Marcos' Motion to Strike Portions of Plaintiff's Complaint and Demurrer. The Court, having read and considered the supporting and opposing points and authorities, and Plaintiff

having waived its right to present oral argument by not scheduling a hearing within five days of the telephonic ruling under San Diego Court Rule 2.2, and good cause appearing,

IT IS ORDERED that:

(1) Judicial Notice is taken as requested as to the Memorandum of Decision and February 10, 1989 Order only;

(2) Defendant's General Demurrer to the First and Second Causes of Action is sustained without leave to amend as Court finds that Hall v. Santa Barbara, 833 F.2d 1270 (9th Cir. 1986), is neither binding nor persuasive to establish a "per se" taking, and Plaintiff is not and cannot allege deprivation of all use of property for a regulatory taking;

(3) The Court on its own motion dismisses this action as to all parties in its entirety with prejudice; and

(4) Under the circumstances defendant's Special Demurrer and Motion to Strike Portions of Plaintiff's Complaint is moot.

DATED: Dec 7, 1989

/S/ Robert J. O'Neill
Judge of the Superior Court

APPROVED AS TO FORM:

/S/ Robert J. Jagiello
Robert J. Jagiello
Attorney for Plaintiff
PALOMAR MOBILEHOME PARK ASSOCIATION

APPENDIX D

APPENDIX D

CALIFORNIA MOBILEHOME RESIDENCY LAWS

(EXCERPTS)

ARTICLE 6. TERMINATION OF TENANCY

§ 798.55. Protection from actual or constructive eviction; termination or refusal to renew; reasons; notice; time

(a) The Legislature finds and declares, that because of the high cost of moving mobilehomes, the potential for damage resulting therefrom, the requirements relating to the installation of mobilehomes, and the cost of landscaping or lot preparation, it is necessary that the owners of mobilehomes occupied within mobilehome parks be provided with the unique protection from actual or constructive eviction afford by the provisions of this chapter.

(b) The management shall not terminate or refuse to renew a tenancy,

except for a reason specified in this article and upon the giving of written notice to the homeowner in the manner prescribed by Section 1162 of the Code of Civil Procedure, to remove the mobilehome from the park within a period of not less than 60 days, which period shall be specified in the notice. A copy of this notice shall be sent to the legal owner, as defined in Section 18005.8 of the Health and Safety Code, each junior lienholder, as defined in Section 18005.3 of the Health and Safety Code, and the registered owner of the mobilehome, if other than the homeowner, by United States mail within 10 days after notice to the homeowner addressed to the legal owner and junior lienholder, and the registered owner at their addresses, as set forth in the registration card specified in Section 18091.5 of the Health and Safety Code.

§ 798.56. Authorized reasons for termination

A tenancy shall be terminated by the management only for one or more of the following reasons:

(a) Failure of the homeowner or resident to comply with a local ordinance or state law or regulation relating to mobilehomes within a reasonable time after the homeowner receives a notice of noncompliance from the appropriate governmental agency.

(b) Conduct by the homeowner or resident, upon the park premises, which constitutes a substantial annoyance to other homeowners or residents.

(c) Conviction of the homeowner or resident for prostitution or a felony controlled substance offense if the act resulting in the conviction was committed anywhere on the premises of the mobilehome

park, including, but not limited to, within the homeowner's mobilehome.

However, the tenancy may not be terminated for the reason specified in this subdivision if the person convicted of the offense has permanently vacated, and does not subsequently reoccupy, the mobilehome.

(d) Failure of the homeowner or resident to comply with a reasonable rule or regulation of the park which is part of the rental agreement or any amendment thereto.

No act or omission of the homeowner or resident shall constitute a failure to comply with a reasonable rule or regulation unless and until the management has given the homeowner written notice of the alleged rule or regulation violation and the homeowner or resident has failed to adhere to the rule or regulation within

seven days. However, if a homeowner has been given a written notice of an alleged violation of the same rule or regulation, on three or more occasions within a 12-month period after the homeowner or resident has violated that rule or regulation, no written notice shall be required for a subsequent violation of the same rule or regulation.

Nothing in this subdivision shall relieve the management from its obligation to demonstrate that a rule or regulation has in fact been violated.

(e)(1) Nonpayment of rent, utility charges, or reasonable incidental service charges; provided that the amount due has been unpaid for a period of at least five days from its due date, and provided, that the homeowner shall be given a three-day written notice subsequent to that five-day period to pay the amount due or to vacate

the tenancy. For purposes of this subdivision, the five-day period does not include the date the payment is due. The three-day written notice shall be given to the homeowner in the manner prescribed by Section 1162 of the Code of Civil Procedure. A copy of this notice shall be sent to the persons or entities specified in subdivision (b) of Section 798.55 within 10 days after notice is delivered to the homeowner. If the homeowner cures the default, the notice need not be sent. The notice may be given at the same time as the 60 days' notice required for termination of the tenancy.

(2) Payment by the homeowner prior to the expiration of the three-day notice period shall cure a default under this subdivision. In the event the homeowner does not pay prior to the expiration of the three-day notice period, the homeowner

shall remain liable for all payments due up until the time the tenancy is vacated.

(3) Payment by the legal owner, as defined in Section 18005.8 of the Health and Safety Code, any junior lienholder, as defined in Section 18005.3 of the Health and Safety Code, or the registered owner, as defined in Section 18009.5 of the Health and Safety Code, if other than the homeowner, on behalf of the homeowner prior to the expiration of 30 calendar days following the mailing of the notice to the legal owner, each junior lienholder, and the registered owner provided in subdivision (b) of Section 798.55, shall cure a default under this subdivision with respect to that payment.

(4) Cure of a default of rent, utility charges, or reasonable incidental service charges by the legal owner, any junior lienholder, or the registered

owner, if other than the homeowner, as provided by this subdivision, may not be exercised more than twice during a 12-month period.

(5) If a homeowner has been given a three-day notice to pay the amount due or to vacate the tenancy on three or more occasions within the preceding 12-month period, no written three-day notice shall be required in the case of a subsequent nonpayment of rent, utility charges, or reasonable incidental service charges.

In that event the management shall give written notice to the homeowner in the manner prescribed by Section 1162 of the Code of Civil Procedure to remove the mobilehome from the park within a period of not less than 60 days, which period shall be specified in the notice. A copy of this notice shall be sent to the legal owner, each junior lienholder, and the

registered owner of the mobilehome, if other than the homeowner, as specified in paragraph (b) of Section 798.55, by certified or registered mail return receipt requested within 10 days after notice is sent to the homeowner.

(f) Condemnation of the park.

(g) Change of use of the park or any portion thereof, provided:

(1) The management gives the homeowners at least 15 days' written notice that the management will be appearing before a local governmental board, commission, or body to request permits for a change of use of the mobilehome park.

(2) After all required permits requesting a change of use have been approved by the local governmental board, commission, or body, the management shall

give the homeowners six months' or more written notice of termination of tenancy.

If the change of use requires no local governmental permits, then notice shall be given 12 months or more prior to the management's determination that a change of use will occur. The management in the notice shall disclose and describe in detail the nature of the change of use.

(3) The management gives each proposed homeowner written notice thereof prior to the inception of his or her tenancy that the management is requesting a change of use before local governmental bodies or that a change of use requested has been granted.

(4) The notice requirements for termination of tenancy set forth in Section 798.56 and 798.57 shall be followed if the proposed change actually occurs.

(5) A notice of a proposed change of use given prior to January 1, 1980, which conforms to the requirements in effect at that time shall be valid. The requirements for a notice of a proposed change of use imposed by this subdivision shall be governed by the law in effect at the time the notice was given.

(h) The report required pursuant to subdivisions (b) and (i) of Section 65863.7 of the Government code shall be given to the homeowners or residents at the same time that notice is required pursuant to subdivision (g) of this notice.

§ 798.56a. Notice to management after receipt of notice of termination by legal owner and each junior lienholder; right to sell mobilehome within park

(a) Within 60 days following receipt, or not later than 65 days after the

mailing, of the notice of termination of tenancy for nonpayment, or rent or other charges, the legal owner and each junior lienholder shall notify the management in writing of at least one of the following:

(1) Its offer to sell the obligation secured by the mobilehome to the management for the amount specified in its written offer. In that event, the management shall have 15 days following receipt of the offer to accept or reject the offer in writing. If the offer is rejected, the person or entity shall have 10 days in which to exercise one of the other options contained in this section and shall notify management in writing of its choice.

(2) Its intention to foreclose on its security interest in the mobilehome.

(3) Its request that the management pursue the termination of tenancy against

the homeowner and its offer to reimburse management for the reasonable attorney's fees and court costs incurred by the management in that action.

(b) In the event that the legal owner or junior lienholder exercises any option described in paragraph (2) or (3) of subdivision (a), and has the right to sell the mobilehome within the park to a third party in accordance with this article, that person or entity shall have the right to keep the mobilehome on the site within the mobilehome park until it is resold as long as the person or entity performs all of the following acts:

(a)(A) Satisfies, within the time period specified in subdivision (a), all of the homeowner's responsibilities and liabilities owing to the management for the 90 days preceding the mailing of the notice of termination of tenancy and then

continue to satisfy them as they accrue from the date of the mailing of that notice until the date the mobilehome is resold.

(B) Performance under this paragraph does not cure the default of the homeowner.

(C) For purposes of this paragraph, the "homeowner's responsibilities and liabilities" means all rents, utilities, reasonable maintenance charges of the mobilehome and its premises, and reasonable maintenance of the mobilehome and its premises pursuant to existing park rules and regulations.

(2) Within the time period specified in subdivision (a), commences all repairs and necessary corrective actions so that the mobilehome complies with park rules and regulations in existence at the time the notice of termination of tenancy was

given as well as the health and safety standards specified in Sections 18550, 18552, and 18605 of the Health and Safety Code, and completes these repairs and corrective actions within 90 calendar days of that notice, or before the date the mobilehome is resold, whichever is earlier.

(3) Complies with the requirements of Article 7 (commencing with Section 798.70) as it relates to the transfer of a mobilehome to a third party.

(c) In the event the legal owner or junior lienholder does not respond to the notice provided by management by notifying management in writing of its election pursuant to subdivision (a), or does not satisfy the requirements of subdivision (b), that person or entity shall have no rights to sell the mobilehome within the park to a third party.

(d) In the event the homeowner files for bankruptcy, the periods set forth in this section are tolled until the mobilehome is released from bankruptcy.

(e) Notwithstanding any other provision of law, including, but not limited to, Section 18099.5 of the Health and Safety Code, in the event neither the legal owner nor a junior lienholder, if any, notifies the management of its decision pursuant to subdivision (a) within the period allowed, or performs as agreed within 30 days, the management may either remove the mobilehome from the premises and place it in storage or store it on its site. In this case, notwithstanding any other provision of law, the management shall have a warehouseman's lien in accordance with Section 7209 of the Commercial Code against the mobilehome for the costs of

dismantling and moving, if appropriate, as well as storage, which shall be superior to all other liens, except the lien provided for in Section 18116.1 of the Health and Safety Code, and may enforce the lien pursuant to Section 7210 of the commercial code.

(f) All written notices required by this section shall be sent to the other party by certified or registered mail with return receipt requested.

ARTICLE 7. TRANSFER OF MOBILEHOME OR MOBILEHOME PARK

§ 798.74. Prior approval of purchaser; grounds for withholding; financial information; notice of acceptance or rejection; interview; fee; credit or refund

(a) The management may require the right of prior approval of a purchaser of a mobilehome that will remain in the park

and that the selling homeowner or his or her agent gives notice of the sale to the management before the close of the sale. Approval cannot be withheld if the purchaser has the financial ability to pay the rent and charges of the park unless the management reasonably determines that, based on the purchaser's prior tenancies, he or she will not comply with the rules and regulations of the park. In determining whether the purchaser has the financial ability to pay the rent and charges of the park, the management shall not require the purchaser to submit copies of any personal income tax returns in order to obtain approval for residency in the park. However, management may require the purchaser to document the amount and source of his or her gross monthly income or means of financial support.

Upon request of any prospective homeowner who proposes to purchase a mobilehome that will remain in the park, management shall inform that person of the information management will require in order to determine if the person will be acceptable as a homeowner in the park.

Within 15 business days of receiving all of the information requested from the prospective homeowner, the management shall notify the seller and the prospective homeowner, in writing, of either acceptance or rejection of the application, and the reason if rejected. During this 15-day period the prospective homeowner shall comply with the management's request, if any, for a personal interview. If the approval of a prospective homeowner is withheld for any reason other than those stated in this article, the management or owner may be

held liable for all damages proximately resulting therefrom.

(b) If the management collects a fee or charge from a prospective purchaser of a mobilehome in order to obtain a financial report or credit rating, the full amount of the fee or charge shall be credited toward payment of the first month's rent for that mobilehome purchaser. If, for whatever reason, the prospective purchaser is rejected by the management, the management shall refund to the prospective purchaser the full amount of that fee or charge within 30 days from the date of rejection. If the prospective purchaser is approved by the management, but, for whatever reason, the prospective purchaser elects not to purchase the mobilehome, the management may retain the fee, or a portion thereof, to defray its administrative costs under this section.